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CLEVELAND, OH 44114

**MAILED**

DEC 15 2010

**OFFICE OF PETITIONS**

In re Patent of McMahon et al.	:	
Patent No. 5,616,851	:	
Issue Date: April 1, 1997	:	Decision on Petition
Application No. 08/536,209	:	
Filing Date: September 29, 1995	:	
Attorney Docket No. 33572.04008	:	

This is a decision on the petition filed June 4, 2010, under 37 CFR 1.378(b) to reinstate the above-identified patent.

The petition is **DISMISSED**.

**Background**

During all the relevant time periods discussed in this decision, Farmex, Inc. (“Farmex”) and Worens Group, Inc. (“WG”) were commonly owned by Stafford Worley and Gerald Stephens.

Patent Attorney Vytas R. Matas, a sole practitioner, represented Farmex and WG, with respect to intellectual property matters from the early 1990s until Matas retired from the practice of law during 2009.

The instant application was filed September 29, 1995.

During September 1995, the inventors assigned their rights in the application to Farmex.

Matas prosecuted the application on behalf of Farmex.

The application issued as Patent No. 5,616,851 on April 1, 1997.

During July 1999, Farmex assigned all its rights in the patent to WG.

The 3.5 year maintenance fee and a surcharge of \$130 were paid December 5, 2000.

The 7.5 year maintenance fee could have been paid April 1, 2004, to October 1, 2004, or with a surcharge from October 2, 2004, to April 1, 2005. The fee was not timely paid. As a result, the patent expired April 2, 2005.

During August 2009, Agratronix LLC (“Agratronix”) engaged the services of Calfee, Halter & Griswold LLP (“Calfee”) to prepare and file a new patent application. Agratronix subsequently instructed Calfee to oversee all of Agratronix’s issued patents.

Agratronix requested Calfee identify all patents owned by Farmex, WG, or Agratronix. On September 10, 2009, Calfee provided Agratronix with a letter responding to the request. The letter identified five expired U.S. patents, 1 expired Canadian patent, and three non-expired U.S. patents.

Between September 10, 2009, and October 23, 2009, Calfee investigated the reasons each the six expired patents had become expired. Calfee discovered three of the U.S. patents and the Canadian patent had intentionally been allowed to expire. Calfee discovered the expiration of the instant patent and Patent No. 6,637,259 had been unintentional.

On an unidentified date during October 2009, Agratronix LLC (“Agratronix”) purchased all the assets of the Farmex Electronics division of Worens Group, Inc. The assets included all rights in the instant patent.

A petition under 37 CFR 1.378(c) to reinstate Patent No. 6,637,259 was electronically filed and granted on October 27, 2009.

The instant petition asserts “considerable effort” was required to investigate the facts and circumstances surrounding the expiration of the instant patent because the patent had expired during 2005. The petition states, “The effort was slightly delayed because [of] harvest time in the fall of 2009 [and the fact] Agratronix’s employees were extremely busy during this time.”<sup>1</sup>

The petition states,

Mr. Matas ... is in poor health and was in and out of a hospital in Florida and in rehabilitation from October 2009 through today. Consequently, Calfee was unable to speak with Mr. Matas regarding [the issues in this case] until February 10, 2010.<sup>2</sup>

Matas informed Calfee that Matas’ file for the instant patent was locked up in his office in Ohio. Matas arranged for the file to be forwarded to Agratronix, who then forwarded the file to Calfee on March 16, 2010.

Calfee was unable to find any information concerning the 7.5 year fee or the 11.5 year fee in the file for the instant patent. In order to obtain additional documentation and to ensure papers

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<sup>1</sup> Page 13.

<sup>2</sup> Page 14 (citations omitted).

involving the instant patent had not been misfiled, Calfee requested Matas transfer all of Agratronix's files to Calfee. Calfee received these files on March 30, 2010.

Several of the files included letters to Farmex or WG regarding maintenance fees and three of the files contained responses instructing Matas to allow those three patents to expire.

After reviewing the files, Calfee contacted Matas for additional information. In early April 2010, Matas informed Calfee that a may have sent WG a reminder by e-mail without placing a copy of the e-mail in the file.

On an unspecified date, Calfee requested Matas send Calfee a copy of all stored e-mail communications regarding the instant patent for the years surrounding the time period during which the 7.5 year maintenance fee was due. Matas supplied Calfee with the e-mails on May 4, 2010, and Calfee reviewed the e-mails from May 4, 2010, to mid-May 2010. The e-mails did not contain any additional information regarding the 7.5 year fee or the 11.5 year fee for the instant patent.

The instant petition was filed by facsimile transmission on June 4, 2010.

### Law

A grantable petition under 37 CFR 1.378(b) must be accompanied by a showing to the satisfaction of the Director that the entire delay in paying the required maintenance fee from the due date for the fee until the filing of a grantable petition pursuant to this paragraph was unavoidable.

In order for a party to show unavoidable delay, the party must show "reasonable care was taken to ensure that the maintenance fee would be promptly paid."<sup>3</sup> The level of "reasonable care" required to be shown is the same as the level of "care or diligence ... generally used and observed by prudent and careful men in relation to their most important business."<sup>4</sup> When determining if a period of delay has been shown to have been unavoidable, the Office will take "all the facts and circumstances into account" and will decide each petition "on a case-by-case basis."<sup>5</sup>

A party may not establish unavoidable delay by proving the party shifted the burden to take appropriate actions to a third party. If one chooses to rely on the actions or inactions of a third party, one will be bound by such actions or inactions.<sup>6</sup> Therefore, a maintenance fee is not paid

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<sup>3</sup> 37 CFR 1.378(b).

<sup>4</sup> *In re Mattulath*, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912). See also *Ray v. Lehman*, 55 F.3d 606, 34 U.S.P.Q.2d (BNA) 1786 (Fed. Cir. 1995) (citations omitted) ("[I]n determining whether a delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person.")

<sup>5</sup> *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (D.C. Cir. 1982).

<sup>6</sup> *Huston v. Ladner*, 973 F.2d 1564, 1567, 23 U.S.P.Q.2D (BNA) 1910 (Fed. Cir. 1992).

as a result of a party's reliance on a third party, such as an attorney, to take certain steps, a petition must address not only the party's actions *but also* must address the third party's actions or inactions. A showing is insufficient if it merely establishes that petitioner did everything petitioner could do monitor the agent's actions and inactions, but fails to address the agent's conduct.<sup>7</sup>

The statute requires a "showing" by petitioner. Therefore, petitioner has the burden of proof. 35 U.S.C. 41(c)(1) states, with emphasis added, "The Director may accept the payment of any maintenance fee . . . after the six month grace period if the delay is *shown to the satisfaction of the Director* to have been unavoidable." The decision will be based solely on the written, administrative record in existence. A petition will not be granted if petitioner provides insufficient evidence to "show" that the delay was unavoidable.

The Office and Congress have recognized the unavoidable standard can be very difficult to meet. During 1992, Congress considered the difficulty involved in reinstating a patent under the unavoidable. Congressional representatives described the unavoidable standard as inflexible, extremely hard to meet, too stringent and harsh.<sup>8</sup> Congress did NOT take steps to make the unavoidable standard more flexible, easier to meet, less stringent, or less harsh. Instead, Congress determined that it would allow patent owners the ability to reinstate a patent under an "unintentional" standard as long as the petition was filed within 24 months of the expiration of the patent. Congress chose to continue requiring proof of unavoidable delay for petitions filed after the 24 month time period.

## Discussion

### Issue 1

When determining if the failure to pay a maintenance fee was unavoidable, one must consider the actions of the party who was responsible for timely paying the fee.<sup>9</sup> At the time the patent expired, the owner of record was WG. Therefore, the Office must initially consider WG's conduct up until the date Agratronix purchased the patent.

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<sup>7</sup> See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396, 397 (1993) ("The [Circuit] court also appeared to focus its analysis on whether respondents did all they reasonably could in policing the conduct of their attorney, rather than on whether their attorney, as respondents' agent, did all he reasonable could to comply with the court-order bar date. In this, the court erred. . . . [I]n determining whether respondents' failure to file their proof of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable." (emphasis in original)).

<sup>8</sup> "[The unavoidable] standard has been found to be extremely hard to meet. Some patent owners have lost their patent rights due to this inflexible standard." 138 CONG. REC. S16613, 16614 (September 30, 1992) (Rep. DeConcini) (emphasis added). "The unavoidable standard has proved to be too stringent in many cases." 138 CONG. REC. H1115 (October 3, 1992) (Rep. Hughes) (emphasis added). "The unavoidable standard is 'too stringent. Some patent owners have lost their patent rights due to circumstances that do not warrant this harsh result, but that could not be considered 'unavoidable' under current law.'" 138 CONG. REC. E1688 (June 4, 1992) (extension of remarks of Rep. McCollum) (emphasis added).

<sup>9</sup> See *Kim v. Quigg*, 718 F.Supp. 1280, 1284, 12 U.S.P.Q.2d (BNA) 1604, 1607 (E.D. Va. 1989).

WG relied on Matas to either pay the 7.5 year maintenance fee when the fee became due or to notify WG when the fee became due.

In view of WG's reliance on Matas, the first issue the Office will address is:

Did Matas, when handling his duty to pay the 7.5 year maintenance fee or notify WG when the fee became due, exercise the same level of care generally used by reasonable and prudent individuals when handling their most important business?

#### Matas' Docketing System

Matas' normal practice was to docket "upcoming due dates by hand written notation on [his] personal flip calendar. Matas Decl. ¶ 13. Matas then "used [his] personal flip calendar docketing system and the Maintenance Fee Reminder from the PTO to track upcoming maintenance fee due dates." *Id.* ¶ 14. Prior to the due date for a maintenance fee, Matas would "send a letter to Farmex or, later WG reminding it of upcoming dates for payment of maintenance fees." *Id.* ¶ 15. Matas states,

My procedure was to receive the Maintenance Fee Reminder form from the PTO and then send a letter to Farmex or Worrens Group directing them to send a check for the upcoming maintenance fee to me and I would then pay the PTO for the maintenance fee.

*Id.* ¶ 16.

The record indicates Matas may have relied, at least in part, on the receipt of maintenance fee reminders from the Office when tracking and/or paying maintenance fees. As a courtesy, if Office records indicate a maintenance fee has not been paid after half of the year during which it can be paid has passed, the Office normally sends a maintenance fee reminder to the address of record. However, Congress has not passed legislation requiring the PTO to send maintenance fee reminders. The Office sends these reminders at its complete discretion and could discontinue the practice at any time.<sup>10</sup> The ultimate responsibility for tracking maintenance fee due dates lies with the patentee, not the USPTO.<sup>11</sup>

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<sup>10</sup> "Congress expressly conditioned §§ 133 and 151 [of the United States Code] on a specific type of notice, while no such notice requirements are written into § 41(c) ... [T]he Commissioner's interpretation of 'unavoidable' and of the PTO's duty to provide reminder notices then, do not plainly contradict the statute. For this reason, we must accord deference to the Commissioner's no-timely-notice interpretation." *Ray v. Comer*, 1994 U.S. Dist. LEXIS 21478, 8-9 (1994), *aff'd on other grounds Ray v. Lehman*, 55 F.3d 606, 34 U.S.P.Q.2d (BNA) 1786 (Fed. Cir. 1995) (*citing Rydeen v. Quigg*, 748 F. Supp. 900, 905 (1990), *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). "The Court concludes as it did in *Rydeen*, that as a constitutional matter, 'plaintiff was not entitled to any notice beyond publication of the statute.'" *Id.* at 3 (*citing Rydeen v. Quigg*, 748 F. Supp. at 906, *Texaco v. Short*, 454 U.S. 516, 536, (1982)). See also *MMTC, Inc. v. Rogan*, 569 F. Supp. 2d 657 (E.D. Va. 2004).

<sup>11</sup> *Id.*

Since a party may not rely on maintenance fee reminders to track maintenance fee due dates, the Office must determine whether the record is sufficient to establish the “personal flip calendar” system used by Matas was reasonable and reliable.

The current record fails to adequately describe Matas’ “personal flip calendar” system. As a result, the Office is unable to properly evaluate the reliability of the system based on the current record. In other words, the current record fails to prove the system was reliable. Any request for reconsideration should include a full discussion of Matas’ system which, at a bare minimum, includes answers to the following questions:

- (1) What dates in the calendar were notated by Matas when entering a patent into the calendar? For example, did Matas notate the first date the fee could be paid, the last date the fee could be timely paid without a surcharge, and/or the last date the fee could be paid with a surcharge?
- (2) For each date in (1), what notation would have been entered on the calendar?

Matas appears to use the phrase “due date” when discussing maintenance fees to refer to the last date the fee could have been paid without a surcharge. As a result, paragraphs 15 and 16 appear to be referring to two different letters. However, in order to ensure the record is completely clear, any request for reconsideration should confirm the paragraphs refer to two different letters. Any request for reconsideration should also discuss the content of each letter. For example, did the first letter request a client forward any maintenance fees identified in the letter to Matas in order for Matas to pay the fees to the Office?

#### The Failure of the Docketing System in This Case

Matas believes he “entered a directive to pay the 7.5 year maintenance fee [in his] flip calendar” in view of a conversation Matas had with WG involving a May 2003 letter referencing the patent. However, Matas did not pay the 7.5 year fee.

Matas asserts his health issues were the reason the “flip calendar handwritten system did not catch the due dates for the 7.5 year maintenance fee.” *Id.* ¶ 46. Matas states, “Absent my poor health in 2004 and 2005, the 7.5 year maintenance fee and the 11.5 year maintenance fee would have been timely paid.” *Id.* ¶ 47.

The record fails to demonstrate Matas’ health issues were a “but for” cause of his failure to either pay the 7.5 year fee or notify WG of the need to pay the fee when the fee became due.

Matas indicates, on *unspecified* dates during 2004-2005, he had heart surgery and had neck surgery. Matas asserts he spent months in rehabilitation after each surgery. Matas states, “Both these surgeries and rehabilitation periods caused me to be away from my legal practice for significant periods during 2004 and 2005.” *Id.* ¶ 37. Matas also states, “While I was hospitalized and in rehabilitation, my wife brought me my mail and I provided her with instructions on certain tasks that needed to be completed.” *Id.* ¶ 38.

The record fails to identify the dates Matas underwent the surgeries and the subsequent rehabilitation. As a result, the Office is unable to determine the extent to which these events

"overlap" with relevant time frames in this case. For example, based on the current record, the first surgery could have taken place on December 15, 2004. However, if the first surgery took place on December 15, 2004, then the surgeries and rehabilitation would fail to Matas' failure to take any action to either pay the fee or notify WG of the need to pay the fee, from the time period beginning April 1, 2004, the first date the fee could have been timely paid, to December 14, 2004. Any request for reconsideration should clearly identify the date Matas had heart surgery and clearly identify the date Matas had neck surgery. Any request for reconsideration should also discuss the date during which Matas underwent rehabilitation.

Matas states, "While I was hospitalized and in rehabilitation, my wife brought me my mail and I provided her with instructions on certain tasks that needed to be completed." *Id.* ¶ 38. However, Matas does not indicate whether or not he requested his wife bring him his flip calendar?

Any request for reconsideration should discuss whether or not Matas requested his wife bring him his flip calendar. If he did not make such a request, any request for reconsideration should discuss the reasons Matas failed to make such a request.

The fact an individual was undergoing rehabilitation on a specific date is not, in and of itself, proof the individual was incapable of working on a specific date. An individual unable to work on day 1 of the rehabilitation may well be able to work on day 100 of the rehabilitation. Therefore, in addition to identifying dates Matas underwent rehabilitation, any request for reconsideration should fully discuss Matas degree of impairment during the dates. If a request for reconsideration is filed, Petitioner may wish to identify the specific dates Matas was undergoing each of the four main phases of rehabilitation following heart bypass surgery and a person. The four phases are:

- Phase I: Rehabilitation at the hospital prior to discharge such as supervised light exercise such as walking down halls or climbing stairs;
- Phase II: This is an early outpatient phase, which normally takes place two to six weeks after discharge for the hospital and can include one-hour meetings three or more times a week;
- Phase III: This phase usually takes place about six to fourteen weeks after discharge and can include a supervised ongoing exercise program;
- Phase IV: This phase is an ongoing wellness program which can also involve supervised exercise routines.<sup>12</sup>

Although the petition does not identify the specific dates Matas was incapable of working, the Office takes judicial notice of the filing dates for the following applications, which appear to have been filed by Matas and which *appear* to indicate Matas was capable of working on a variety of dates during 2004 and 2005:

<u>Filing Date</u>	<u>Application</u>
01/07/04	10/753,039
01/13/04	60/536,147

<sup>12</sup> See <http://www.cardiac-risk-assessment.com/heart-disease-treatment/cardiac-rehabilitation>.

01/29/04	60/540,164
02/05/04	60/542,002
03/22/04	60/555,107
03/25/04	10/809,074
05/14/04	60/571,468
06/12/04	10/866,121
06/30/04	10/881,054
08/02/04	60/598,027
08/27/04	60/605,351
09/15/04	10/941,726
09/29/04	60/614,086
10/08/04	60/617,024
01/11/05	11/032,905
01/21/05	11/040,856
03/09/05	11/076,147
03/10/05	60/660,298
03/24/05	60/664,564
05/11/05	11/126,656
05/13/05	60/680,909
08/23/05	11/209,902
12/06/05	11/295,375

Any request for reconsideration should *fully and clearly* identify all dates (during 2004-2005) Matas was capable of performing work such as drafting applications or drafting papers to be filed in an existing application.

If Matas' health problems prevented him from paying the 7.5 year fee in this case or notifying WG when the fee became due, then his health problems likely caused him to fail to pay fees for other patents or notify other clients when such fees became due. Any request for reconsideration should identify all cases handled by Mathas for which a maintenance fee became due between April 1, 2004, and April 1, 2005, and indicate whether or not Mathas timely paid the fee or notified the client when the fee became due.

Matas' Failure to Make Alternative Arrangements for Either Timely Paying the 7.5 Year Maintenance Fee or Notifying WG When the Fee Became Due

Even if the record established Matas' health prevented him from timely paying the 7.5 year maintenance fee and from notifying WG when the fee became due, the showing of record would be insufficient to establish the failure to timely pay the fee was unavoidable.

A reasonable attorney treating the attorney's obligation to either notify a client of the need to pay a maintenance fee when the fee becomes due or to pay the fee with the same level of care normally used by prudent and careful individuals when handling their most important business, would notify a client or obtain co-counsel for assistance if the attorney's health began to impair the attorney's ability to take such actions.

Matas does not appear to have notified WG that WG should independently monitor maintenance fee due dates for its patents, or obligate another party to monitor the maintenance fee due dates. Matas does not appear to have obtained assistance in handing his legal obligations to WG from another patent attorney or a patent agent. The record fails to establish Matas' health rendered him incapable of taking the prior actions.

Any request for reconsideration should fully discuss the extent to which Matas' health rendered him incapable of notifying WG that WG should independently monitor maintenance fee due dates for its patents, or obligate another party to monitor the maintenance fee due dates. Any request for reconsideration should also fully discuss the extent to which Matas' health rendered him incapable of obtaining assistance from another patent attorney or a patent agent.

#### Matas' Conduct Following the Expiration of the Patent

A showing under 37 CFR 1.378(b) must establish the *entire* delay in the submission of the maintenance fee was unavoidable. Specifically, the record fails to establish Matas' failure to learn the patent had expired during the years following the patent's expiration on April 2, 2005, was unavoidable.

The record fails to demonstrate Matas' health prevented him during all of 2006 and 2007, from:

1. Personally reviewing his past records to determine if he had missed any legal deadlines, or failed to notify any clients of any legal deadlines, during 2004 and 2005 due to his health,
2. Employing another individual to review Matas' past records to determine if Matas had missed any legal deadlines, or failed to notify any clients of any legal deadlines, during 2004 and 2005 due to his health, and/or
3. Contacting WG to inform WG that Matas may have missed have missed one or more legal deadlines, or failed to notify WG of one or more legal deadlines, during 2004 and 2005.

The record fails to prove Matas' failure to take the actions above did not result in any delay in the filing of a petition under 37 CFR 1.378 by delaying the discovery the patent had expired.

#### Issue 2

On September 10, 2009, Calfee provided Agratronix with a list of patents. The list indicated the instant patent was expired. A petition to reinstate the patent was not filed until 8 months and 24 days later on June 4, 2010. A grantable petition under 37 CFR 1.378(b) must be accompanied by a showing to the satisfaction of the Director that the entire delay in paying the required maintenance fee from the due date for the fee until the filing of a grantable petition pursuant to this paragraph was unavoidable. Therefore, the Office must determine:

Has Petitioner established the entire delay from the date Petitioner learned of the patent's expiration until the date the petition was filed was unavoidable?

The instant petition asserts “considerable effort” was required to investigate the facts and circumstances surrounding the expiration of the instant patent because the patent had expired during 2005. The petition states, “The effort was slightly delayed because [of] harvest time in the fall of 2009 [and the fact] Agratronix’s employees were extremely busy during this time.”<sup>13</sup> Delay resulting from a preoccupation with other matters, which are given precedence over an application or patent, is not unavoidable delay.<sup>14</sup> Any request for reconsideration should fully discuss the nature and extent of the delay resulting from activities involving harvest time.

A September 10, 2009 communication from Calfee informed Petitioner the instant patent, four other U.S. patents, and one Canadian patent. The petition appears to imply the only work performed by Calfee involving the instant patent during the more than 6-week time period from September 10, 2009, to October 27, 2009, was discovering WG had not intentionally allowed the instant patent to expire. However, in view of a license agreement involving the patent cited in the petition, the record would appear to indicate Calfee should have been able to promptly discover WG did not intentionally allow the patent to expire. Any request for reconsideration should *fully* discuss all work involving discovering the status of the patent or reinstatement of the patent performed by Calfee or any other party the time period from September 10, 2009, to October 27, 2009.

Calfee asserts Calfee was unable to speak with Matas until February 10, 2010, five months after discovering the patent had expired. However, Calfee does not fully discuss any attempts made to contact and/or speak with Matas prior to February 10, 2010. Any request for reconsideration should *fully* discuss all actions Calfee took as part of any attempts to contact and/or speak with Matas. For example, the request should fully discuss the first date made an attempt to contact Matas and the nature of the attempt by Calfee.

Prior to February 10, 2010, Calfee had months of time to learn many, if not all of, the facts relevant to the expiration of the patent excluding facts that could only be obtained from Matas. On March 30, 2010, Calfee received a copy of Matas’ files for the other Agratronix patents. As of March 30, 2010, almost seven weeks had passed since Calfee had received a copy of Matas’ file for the instant patent. On March 30, 2010, Calfee received a copy of Matas’ files for the other Agratronix patents. However, a petition was not filed until June 4, 2010.

The petition appears to assert the 5 weeks of delay in filing the petition from March 30, 2010, until June 4, 2010, was the result of Matas informing Calfee, during early April 2010, that Matas *might* have sent an e-mail concerning the fee for the instant patent to WG in the past. The Office notes such an e-mail was not discovered during the subsequent investigation by Calfee. The record fails to establish the five weeks of delay in filing the petition, following almost 29 weeks

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<sup>13</sup> Page 13.

<sup>14</sup> “[T]he preoccupation of plaintiff’s attorney with other legal matters or with moving his residence does not relieve him of the burden of complying with the Patent Office regulations. Plaintiff’s delay due to his inadvertence or mistake does not constitute ‘unavoidable’ delay.” *Smith v. Diamond*, 209 U.S.P.Q. (BNA) 1091 (D.C. Cir. 1981) (*citing Potter v. Dann*, 201 U.S.P.Q. 574,575 (D. D.C. 1978)). *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 398 (1993) (“In assessing the culpability of respondents’ counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date.”)

of prior delay, was unavoidable delay. The possible existence of an e-mail did not prevent Petitioner from filing a petition. If Petitioner had believed such evidence might exist and be relevant, Petitioner could have filed a petition under 37 CFR 1.378(b) along with a request for the Office to postpone a decision on the petition until Petitioner can supplement the petition.

### Fees

Upon receiving the petition, the Office charged \$1,240 for the 7.5 year maintenance fee and \$700 for the required surcharge to Deposit Account No. 03-0172.

A review of the petition indicates the petition includes authorization to charge the 11.5 year maintenance fee to the deposit account. Therefore, the Office is charging the \$2,055 fee to the deposit account.

### Conclusion

Petitioner has the burden of proof.

Petitioner has failed to prove the entire delay in the submission of the 7.5 year maintenance fee was unavoidable. Therefore, the petition cannot be granted.

### Petitioner's current options

#### I. Petitioner may file a request for reconsideration.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Any petition for reconsideration of this decision must be accompanied by a non-refundable petition fee of \$400 as set forth in 37 CFR 1.17. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.378(b)." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

*After a decision on the petition for reconsideration is issued, no further reconsideration or review of the matter will be undertaken by the Director.* Therefore, it is extremely important that petitioner supply any and all relevant information and documentation with his request for reconsideration. The Commissioner's decision will be based solely on the administrative record in existence. Petitioner should remember that it is not enough that the delay was unavoidable; petitioner must prove that the delay was unavoidable. A petition will not be granted if petitioner provides insufficient evidence to "show" that the delay was unavoidable. Therefore, if a request for reconsideration is filed, it must establish that the entire delay in the submission of the maintenance fee was unavoidable.

#### II. Petitioner may request a refund of the maintenance fee and surcharge which accompanied the petition.

Since the petition is dismissed, petitioner may request a refund of the maintenance fee and surcharge. Petitioner is reminded that if a request for reconsideration is later filed along with the

\$400 fee, the \$400 will not be refunded. A request for a refund should be sent to: Mail Stop 16, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450. A copy of this decision should accompany any request for refund.

Further correspondence with respect to this matter may be submitted as follows:

By Internet: A request for reconsideration may be filed electronically using EFS Web.<sup>15</sup> Document Code "PET.OP" should be used if the request is filed electronically.

By mail: Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

By facsimile: (571) 273-8300  
Attn: Office of Petitions

By hand: U.S. Patent and Trademark Office  
Customer Service Window  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



Charles Steven Brantley  
Senior Petitions Attorney  
Office of Petitions

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<sup>15</sup> General Information concerning EFS Web can be found at <http://www.uspto.gov/patents/process/file/efs/index.jsp>.